Supreme Court, U.S.
FILED
93-1027 NOV 21 1993
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Case No. _____

IN THE

Supreme Court of the United States

October Term, 1993

MARY HORNING, PETITIONER

vs.

STATE OF OHIO, RESPONDENT

Petition for Writ of Certiorari to the United States Supreme Court

Petition for Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

I

Whether a mentally handicapped defendant can knowingly and voluntarily waive her constitutional right to remain silent if she is mentally ill and delusional before, during and after custodial interrogation.

II

Whether a mentally handicapped defendant is denied her constitutional right to confront the witnesses against her, if a court precludes cross-examination of the State psychologist about the defendant's "confession" on the ground the witness never read it.

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OPINIONS DELIVERED IN THIS CASE[1]

March 11, 1991	Trial Court denial of Defendant's motion for suppression.
March 29, 1991	Trial Court judgment on jury verdict finding Defendant Mary Horning guilty of the crime of aggravated arson. Journalized 4/15/91.
April 2, 1991	Trial Court denial of Mrs. Horning's motion for a new trial and sentencing to 10 years of actual incarceration at the Marysville Reformatory for Women. Journalized 4/18/91.
January 28, 1993	Ohio Eighth District Appellate Court affirms the decision of the trial court allowing introduction of Mrs. Horning's statement into evidence, and precluding cross examination of the state's expert psychiatric witness regarding Mrs. Horning's statement.
March 12, 1993	Ohio Eighth District Appellate Court denial of Mrs. Horning's motion for reconsideration.
September 22, 1993	Ohio Supreme Court denial of Mrs. Horning's writ of certiorari.

[1] The full text of each decision is contained in the Appendix.

JURISDICTIONAL GROUNDS

This petition for writ of certiorari is taken from the Judgment and Order of the Ohio Supreme Court, denying Defendant's writ for certiorari. The petition filed with the Ohio Supreme Court sought review of the Ohio Eighth Appellate Court's decision, which affirmed the trial court's admission of the petitioner's statement. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

Amendments to the United States Constitution

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United Sates, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Ohio Rules of Evidence
Rule 611. Mode and Order of Interrogation and Presentation.

(A) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(B) Scope of cross-examination. Cross-examination shall be permitted on all relevant matters and matters affecting credibility.

(C) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

Ohio Revised Code §2909.02 Aggravated arson.

(A) No person, by means of fire or explosion, shall knowingly:

(1) Create a substantial risk of serious physical harm to any person;
(2) Cause physical harm to any occupied structure;
(3) Create, through the offer or acceptance of an agreement for hire or other consideration, a substantial risk of serious physical harm to any person or of physical harm to any occupied structure.

(B) Whoever violates this section is guilty of aggravated arson, an aggravated felony of the first degree.

STATEMENT OF CASE AND FACTS

Statement of Facts

Preface

Three transcripts make up most of the trial court record:

- Mrs. Horning's oral statement (which was transcribed at the trial court's request and used as a record in lieu of the audio recording tape);
- the transcript of the motion for suppression hearing; and
- the transcript of the trial. Citations to these transcripts use the conventions illustrated in the following examples:

C 10,15. Oral statement (*C*onfession) made by Mrs. Horning at the Rocky River police station on May 29, 1991; unedited, text version of motion to suppress tape. State's Motion Exhibit 2. Example refers to page 10, line 15.

S 120, 9-15. Transcript Volume I. Proceedings of Motion to *S*uppress hearing on February 5, 1991. Example cites page 120, lines 9 through 15.

T 12-13, 20-8. Transcript Volumes II - IV. *T*rial proceedings, Example is for page 12, line 20 through page 13, line 8.

Background

The Defendant/Appellant Mary Horning is thirty-four years of age. She married in 1983, and for the last eleven years she suffered from a progressively worsening mental illness. Mrs. Horning

experienced her first episode of mental illness in 1980. She worked at that time for Penton Publishing Company in an accounting position. She continued to work at Penton Publishing through 1984, when her mental illness began to interfere with her normal work duties. As a result, Penton Publishing placed her on part-time status. She remained on part-time status until 1988, when her deteriorating mental condition prevented her from performing her job reliably. Due to her condition, Penton Publishing released her and advised she apply for Social Security disability benefits. In about February of 1988, *the Social Security Administration found Mrs. Horning was totally disabled by reason of her mental illness.*

Through the period of her illness, Mrs. Horning has had a number of treating psychiatrists, psychologists and counselors. In addition, her mental health condition has been evaluated by Social Security Administration and court mental health specialists. These professionals concluded, unanimously, that Mrs. Horning suffers from an unspecified type of dissociative disorder, with characteristics of a multiple personality.

Dr. Dennis Savinsky's following testimony aptly summarizes Mrs. Horning's medical history and his familiarity with it:

> Q. Now how long have you been Mary Horning's treating psychiatrist, doctor?
> A. Since the fall of 1984.
> Q. And that's when you first met her?
> A. Yes.
> Q. And since 1984, up until the present time, have you continuously been her treating psychiatrist?
> A. There have been a few exceptions when she has been hospitalized at other hospitals where I'm not on staff, and she has been under the care of other physicians during those admissions.
>
> . . .
>
> Q. Now, during this entire period of time, since 1984, are you aware of whether Mary Horning has had psychiatric

admissions? I know you mentioned once or twice. What other ones?

A. She has had approximately thirty-five psychiatric admissions since 1980.

. . .

Q. Which of those admissions were you her treating psychiatrist for?

A. I believe for all but five. [S 81-83, 16-6].

Offense

On May 15, 1991, a small fire took place at Mrs. Horning's residence in Rocky River, Ohio; a small decorative wreath on an upstairs door was set afire. The fire, which was more akin to vandalism than aggravated arson, caused damage in the total amount of $287.00. The Rocky River Fire Department determined the fire to be the result of arson by simply having been unable to find the cause of origination. The state fire marshall was not involved in the investigation.

When investigators learned Mrs. Horning was a psychiatric patient, she was asked to come to the Rocky River police station for questioning.

Arson investigator, Captain Carl Kalkbrenner of the Rocky River Fire Department, was present at the scene, in response to Mrs. Horning's report of the fire. Captain Kalkbrenner testified that he left the fire station to go to the scene of the fire at approximately 12:30 p.m.:

Q. How long, based on your training and experience, would you say that fire had been burning once you arrived on the scene?

A. Once I arrived on the scene?

Q. How long prior to that time —

A. Oh.

Q. —was the fire started?

A. My estimate would be between five and ten minutes? [T 53, 8-15.]

Captain Kalkbrenner's testimony puts the approximate starting time of the fire *between noon and 12:30 p.m.*

Mrs. Horning's statement indicates that the day of the fire, she awoke at 5:30 a.m. She had breakfast; after her husband left for work, *she began to organize a yard sale* she was having that day. Mrs. Horning stated that by 10 a.m., it was still cold outside and she had no visitors, so she loaded her car with clothing and books and drove to a Goodwill store to donate the clothing. She also went to the Rocky River library to donate the books.

When Lt. Bruce Gunsch of the Rocky River Police Department asked Mrs. Horning if one of her *other personalities* could have committed the arson, she whispered that one of her personalities *could* have set the fire *before* leaving for the Goodwill store and the library. She stated she was at the library between 11:00 a.m. and 11:30 a.m., and upon returning home was surprised to find there was *no fire*.

"Confession"

Without her husband, psychiatrist or attorney present, Mrs. Horning met with Lt. Gunsch *for over an hour*. When the interrogation began, Mrs. Horning denied starting the fire. After about twenty minutes of questioning, Lt. Gunsch asked her *whether one of her other personalities might* have a "tendency to arson." [C 17, 11-24]. She responded by admitting *it was possible*. But only several minutes later she stated:

> Well, actually I'm not sure if I ever tried to set any fires or not. Because I thought it looked like things were set. I used to always go down the basement because I was always afraid that my mother was trying to set fires. It could have been me." [C 26, 7-11].

Mrs. Horning's statement to the Rocky River Police Department contained other remarks, suggesting aberrant and delusional thinking. In the following passage, for instance, she responded to Lt. Gunsch's question of whether she was an abused child:

> Twenty-seven years. I'm mad at my husband because I don't even know the name of the lawyer that's handling our, trying to get something done about that. But it started day one when my mother tried to shove me off the hospital and said "this isn't my child". I was supposed to be born dead. I still don't think I'm their child . . . . [C 16-17, 20-2].

Throughout her statement there are recurrent references to a vague fear of her home:

> I was scared about living where I am. [C 2, 22].

> I hate living there. It's just an awful house and stuff and my husband won't move. [C 18, 21].

> I hated that house. And what my husband did to me there. [C 19, 18-19].

> I was getting really scared . . . my husband wouldn't move out to some place safer or nicer. I was afraid to be there. [C 25, 2-8].

All through the interrogation, Lt. Gunsch tried to determine Mrs. Horning's motive for starting the fire—a fire his questions presumed she set. Mrs. Horning's only answer was that she feared the house and wanted revenge on her husband because he raped her and wouldn't allow her to have a puppy for companionship.

Following the hour-long interrogation by Lt. Gunsch, the Rocky River police took Mrs. Horning directly to the psychiatric ward of Fairview General Hospital, where she was immediately admitted for an extended period of treatment.

Statement of the Case

The indictment in this case issued on June 1, 1990. It charged Mrs. Horning with aggravated arson (RC §2909.02), including a prior aggravated felony specification. As earlier stated, the arson was a small fire at the Defendant/Appellant Mary Horning's Rocky River residence, which caused damages of $287.00. In response to the charge, Mrs. Horning entered pleas of not guilty and not guilty by reason of insanity.

Because of the insanity plea, the trial court referred Mrs. Horning to the court psychiatric clinic. The clinic evaluated her competency to stand trial and her sanity at the time of the act. The clinic completed its evaluation on August 21, 1990. Based on the psychiatric reports, State and defense counsel stipulated to her competency to stand trial.

After an exchange of discovery information and materials, the defense filed a motion to suppress Mrs. Horning's oral and written statements. The motion claimed that Mrs. Horning was mentally incapable of waiving her constitutional right to remain silent. The motion also questioned whether, because of her illness, Mrs. Horning was able to make a voluntary statement, and whether such a statement would be reliable.

The trial court denied Mrs. Horning's motion for suppression on March 15, 1991. The journal entry in its entirety reads as follows:

> Defendant in Court with Counsel, Defendant's Motion to Suppress evidence is denied. Trial set for March 26, 1991 at 9:00 a.m.

The trial began on March 26, 1991. Almost exclusively, the State's case was based on Mrs. Horning's written and taped "confession." On the issue of sanity, the State called Dr. Nancy Huntsman as its expert witness. During cross-examination of Mrs. Horning, defense counsel challenged Dr. Huntsman's qualifications. The defense maintained that Dr. Huntsman could not give opinion

testimony on any aspect of Mrs. Horning's condition, because Dr. Huntsman:

- Had not consulted Mrs. Horning's psychiatrist of the prior eight years;
- Had not reviewed copies of the Fairview General Hospital medical records related to Mrs. Horning's extended psychiatric admission at the time of the offense and statement;
- Could not remember seeing Mrs. Horning's written statement; and
- Had never listened to Mrs. Horning's taped statement or read the transcript of that statement, both of which had been provided her months in advance of the trial.

Defense counsel then attempted to read portions of the transcript of Mrs. Horning's statement to elicit Dr. Huntsman's opinion. However, the trial court refused to permit any questions about the taped statement.

On March 29, 1991, the jury returned their verdict, finding Mrs. Horning guilty of aggravated arson with a prior felony specification. On April 2, 1991, the trial court denied Mrs. Horning's motion for a new trial and sentenced her to ten years of actual, non-probationable incarceration, pursuant to Ohio Revised Code §2929.11.

Mrs. Horning filed her appeal to the Ohio Court of Appeals, Eighth Appellate District, on April 22, 1991. During the pendency of that appeal, Mrs. Horning was free on an appeal bond. Mrs. Horning argued that the trial court erred in not suppressing her statement, using the same constitutional grounds previously argued in the trial court.

On January 28, 1993, the Court of Appeals announced its decision, affirming the trial court's ruling on the motion to suppress; affirming Mrs. Horning's conviction; and revoking her bond. The portion of the appellate court's decision dealing with the suppression motion is set forth below:

> In this case, appellant submitted evidence of her extensive psychiatric medical history. She also draws attention to the fact that her confession interview included denials and some delusional statements.
>
> However, Lt. Gunsch testified that appellant was coherent and did not exhibit unusual behavior at the confession. The tape of the confession was played at the suppression hearing. The interview between Gunsch and appellant was not hostile or coercive, and appellant freely confessed to the crime. Appellant's written waivers of her rights were also admitted into evidence. The trial court reasonably concluded from this evidence that appellant's waiver was intelligently made, and properly denied the motion to suppress. [Journal Entry and Opinion of Ohio Court of Appeals, Eighth Appellate District, page 37 of the Appendix].

Mrs. Horning's application for reconsideration was denied on March 12, 1993. From that denial, Mrs. Horning filed a further appeal in the Ohio Supreme Court for a writ of certiorari. Her petition to the Court of Appeals for reinstatement of her appeal bond was granted by that court on or about May 25, 1993.

On September 22, 1993, the Ohio Supreme Court denied Mrs. Horning's request for further review:

> Upon consideration of the motion for leave to appeal from the Court of Appeals for Cuyahoga County, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

ARGUMENT

I. Voluntariness and Admissibility

Whether a mentally handicapped person can knowingly and voluntarily waive her constitutional right to remain silent if she is mentally ill and delusional before, during and after a police interrogation.

Background

Before and after the enactment of the Bill of Rights, federal judicial inquiry has focused on the issue of a confession's reliability. Beyond this, constitutional law in the federal courts—concerning confessions—was slow to develop. Before 1964, the United States Supreme Court considered fewer than forty cases involving the admissibility of confessions in state courts. All of these cases were decided after 1935. *Criminal Defense Techniques*, §3.03 (Matthew Bender, 1977).

Since the 1930s, this Court has several times addressed the admissibility issues surrounding confessions. This broadened scope of inquiry could be said to have started with this Court's decision in *Brown v. Mississippi*, 297 U.S. 278 (1936). In that case police officers obtained confessions through the use of force; and it was held that such coercive government misconduct was the catalyst for the decision; and that the actions of police were "revolting to the sense of justice." *Brown v. Mississippi* at 286.

In following years, the Court set forth a number of criteria by which to judge the admissibility of confessions:

- **The age of a defendant was considered significant in determining the validity of a confession.** *Haley v. Ohio*, 332 U.S. 596, 68 S.Ct. 302, 92 L.Ed. 224 (1948)

(determining the admissibility of the confession of a fifteen-year-old boy);

- **Intelligence and education.** *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed. 2d 770 (1963) (examining the confession of a nineteen-year-old "near mental defective");

- **Conditions of interrogation.** *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed. 2d 837, (1963) (noting the effect of continued and coercive interrogation); and

- **Coercion.** *Lynumm v. Illinois*, 372 U.S. 528, 83 S.Ct. 917, 9 L.Ed. 2d 922 (1963) (invalidating the confession of a woman persuaded to confess so her children would not be taken away).

***Blackburn* and the Totality of Circumstances**

One case in which this Court dealt specifically with the issue of mental illness and the admissibility of confessions was *Blackburn v. Alabama*, 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960). In that case, the Armed Forces discharged Blackburn, based on a mental disability. The offense occurred when Blackburn was on an unauthorized leave from a Veterans Administration hospital where he was being treated for psychosis. The police, knowing Blackburn to have a mental disability, subjected him to a nine-hour interrogation in a small room. Under these circumstances, Blackburn gave a written confession admitting to a robbery.

Shortly afterward, Blackburn exhibited symptoms of insanity and was committed for four years. After his release, he was tried for robbery and convicted, based almost solely on his confession. The main issue advanced on appeal was whether Blackburn's confession was involuntary, because of his obvious mental illness. This Court reversed Blackburn's conviction.

The Court examined the "totality of the circumstances," citing its earlier case of *Fikes v. Alabama*, 352 U.S. 191, 1 L.Ed.2d 246, 77

S.Ct. 281 (1957). After examining the whole factual picture, Chief Justice Earl Warren wrote: "We are unable to escape the conclusion that Blackburn's confession can fairly be characterized only as involuntary." *Blackburn v. Alabama* at U.S. 205.

***Colorado v. Connelly*—Coercive Activity**

In 1986, this Court gave focus to the pattern of prior cases, which made the declarant's state of mind of prime importance in the test for voluntariness. In that case, a declarant volunteered information to the police without police solicitation and gave a detailed, verifiable statement, admitting his guilt in a murder. The declarant was held in custody overnight, and the following day became "visibly disoriented." He was admitted to a psychiatric facility and revealed to a psychiatrist that he was acting on the "voice of God" in making his confession. *Colorado v. Connelly*, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986).

The declarant ultimately argued that his confession should be suppressed, because his free will and intellect were impaired by his mental condition at the time of the interrogation. On appeal from the Colorado State Supreme Court's ruling invalidating the confession, this Court held that coercive police activity is a prerequisite to a finding of involuntariness. The Court rejected outright the "free will" notion of voluntariness, stating that such a standard would impose a "far-ranging requirement that courts must divine a defendant's motivation for speaking or acting as he did even though there be no claim that governmental conduct coerced his decision." *Colorado v. Connelly* at U.S. 166.

But even while rejecting a "free will" analysis, this Court stated specifically that *mental condition is surely relevant to an individual's susceptibility to police coercion*. Thus, the *Townsend* and *Blackburn* cases were not overruled. In fact, they were expressly recognized and cited as instances where police had knowingly exploited an individual's mental infirmity. These instances were included in *Connelly* to illustrate the relationship between a defendant's mental condition and police coercion. In *Townsend*, the

coercion involved administering truth serum to chemically alter the suspect's mental condition. In *Blackburn*, the police engineered a nine-hour, tiny-room interrogation of a person known to have a history of "mental problems."

Mrs. Horning's "Confession"

Clearly, a defendant's mental condition is relevant to the admissibility of her so-called "confession". In Mrs. Horning's case, one can gain no better insight into her mental condition than to read the statement itself. She is fortunate her statement was recorded and transcribed in its entirety. Without such recording, she would be compelled to rely on the signed, written statement, which contained only a selectively edited version of the interrogation.

Mrs. Horning's oral statement contained rambling delusions, such as:

> . . . it started day one when my mother tried to shove me off the hospital and said 'this isn't my child'. I was supposed to be born dead. I still don't think I'm their child . . . . [C 16-17, 20-2].

One must never lose sight of the fact that Mrs. Horning was identified by the fire department as a mental patient the day of the incident. Lt. Gunsch, the police arson investigator, was informed the fire department had had a prior emergency call from Mrs. Horning, related to an overdose of her medication. Thus, two weeks prior to the interrogation, Lt. Gunsch knew full well that Mrs. Horning was mentally ill when he telephoned her to come to the police station. She went alone.

There is further evidence of police coercion. The prosecution tendered a written statement which Lt. Gunsch maintained was a "word-for-word" transcription of Mrs. Horning's oral statement. That written statement indicated simply she had set the fire. The written statement—*which was typewritten by a stenographer because Mrs. Horning was unable to write*—had some glaring omissions. For

example, it did not disclose that within the span of 20 minutes, she had changed her mind three times about whether she started the fire.

Mrs. Horning first denied starting the fire:

Q. Mary answer this question. But do you ever get so upset or angry with someone or desperate for whatever reason that you personally would ever think of doing something like this?
A. Not setting a fire. [C 7, 17-21].

But shortly after, Lt. Gunsch, knowing Mrs. Horning was suffering from a multiple personality disorder, asked her hypothetically if one of her other personalities could have started the fire. When Mrs. Horning related that during her childhood she wanted to start a fire in her mother's home, Lt. Gunsch asked:

Q. You set the fire [now under investigation] upstairs too?
A. Yes. [C 19, 12-13 (Parenthetical added)].

Only minutes later Lt. Gunsch concluded his interrogation by asking:

Q. Okay, [did you ever set any other fires] other than the fire in the basement and the one that we're here about?
A. Well, actually I'm not sure if I ever tried to set any fires or not. Because I thought it looked like things were set. I used to always go down the basement because I was always afraid that my mother was trying to set fires. It could have been me. [C 26, 11-17 (Parentheticals added)].

In the context of these facts, it is difficult to imagine more coercive—and deceptive—police conduct than preparing and procuring Mrs. Horning's signature on the written statement.

At the suppression hearing, the State introduced no evidence relative to the issue of Mrs. Horning's mental illness. The only expert testimony was that of the *defense* psychiatrist, Dr. Dennis Savinsky,

who testified there was no reasonable doubt in his mind that Mrs. Horning was laboring under a mental illness when she gave her statement. He also testified it would be "very questionable" for Mrs. Horning to have had the mental ability to make decisions or exercise judgment about her constitutional rights. Dr. Savinsky's testimony was undisputed:

> I think it [Mary's mental condition] is very questionable at the time of the interview [between Lt. Gunsch and Mary Horning]. And the reason I have come to that conclusion is, following her admission to the hospital, it was very clear that the interview was very psychologically traumatic for her.
>
> Throughout the course of her hospitalization, she could not recall any details of the interview. She was in the hospital nearly six weeks. And I had asked her on several different occasions what her recollection of the interview was and it varied. [S 100, 2-21 (Parentheticals added)].

Mrs. Horning's statement, the testimony of Lt. Gunsch and the testimony of Dr. Savinsky make up the trial court's record. Based on the evidence, no one doubted Mrs. Horning was a mentally ill person. Indeed, the evidence establishing her mental illness was overwhelming. Not only was her impairment indisputably documented long before the date of the offense, but also the record shows that *she was twice hospitalized in May of 1990*. The first hospitalization was about two weeks before the fire; the second, immediately after giving her statement to Lt. Gunsch.

Recent Federal Cases

Recent federal cases have looked at mental illness—not simply because it makes a declarant more susceptible to coercion—but also because, *regardless of a statement's voluntariness, the declarant must still knowingly and intelligently waive her* Miranda *rights. Miller v. Dugger*, 838 F.2d 1530 (11th Cir. 1988), *cert. denied*, 486 U.S. 1061, 108 S.Ct. 2832, 100 L.Ed.2d 933 (1988) ("We do not read the *Connelly* decision as demonstrating an

intent by the Supreme Court to eliminate *this distinction between voluntariness and knowing waivers*. . . . We cannot therefore conclude, . . . that *Connelly* overruled *Edwards v. Arizona*."). See also *Colorado v. Spring*, 479 U.S. 564 (1987); *Edwards v. Arizona*, 451 U.S. 477 (1981). [Emphasis added].

The *Miller* Court held that:

> There is little doubt that mental illness can interfere with a defendant's ability to make a knowing and intelligent waiver of his Miranda rights. Competency to make such a waiver is, of course, to be determined according to the totality of the circumstances.
>
> . . . .
>
> In the instant case, the trial court, without giving Miller's counsel the opportunity to argue that Miller's *Miranda* waiver was invalid, apparently assumed that voluntariness and waiver constituted the same issue, and that the state was entitled to introduce Miller's statements into evidence if the facts demonstrated that Miller's confession was voluntary. The trial court made the mistake committed by the Arizona trial judge in *Edwards v. Arizona* of confusing voluntariness and waiver. Accordingly, we conclude that the trial court erred by admitting Miller's statement without first deciding that Miller had made a valid waiver of his *Miranda* rights. *Miller v. Dugger*, 838 F.2d 1530 (11th Cir. 1988) at 1539-40, *cert. denied*, 486 U.S. 1061, 108 S.Ct. 2832, 100 L.Ed.2d 933 (1988).

In summary, the trial court's record describes Mrs. Horning as someone who was:

- ☐ mentally ill for years *before* the offense;
- ☐ delusional *during* the statement; and
- ☐ admitted to a psychiatric ward immediately *after* giving her statement.

Surely, Mrs. Horning's statement was not even coherent, much less *voluntary* or *knowing*.

II. Sixth Amendment Rights

Whether a mentally handicapped defendant is denied her constitutional right to confront the witnesses against her, if a court precludes cross-examination of the State psychologist about the defendant's "confession" on the ground the witness never read it.

Introduction

The only evidence against Mrs. Horning was her taped statement. Therefore, when defense counsel attacked the reliability and admissibility of the statement, the prosecution called court psychologist Nancy Huntsman as a rebuttal witness. Dr. Huntsman's unusually brief direct examination can be summarized by the following excerpt:

> A. Well, my opinion was that, and is that at the time of the alleged offense, Mrs. Horning was suffering from a mental disease and defect.
>
> It was also my opinion that at the time of the offense, the mental disease and defect did not impair her ability to know the wrongfulness of the act that is alleged.
>
> It is also my opinion that the mental disease and defect did not impair her ability to refrain from acting in that way. [T 305, 10-19].

A fundamental principle of constitutional law is that a criminal defendant may cross-examine any prosecution witness. United States Constitution, 6th Amendment; Ohio Constitution, Article I, Section 10. The Ohio Rules of Evidence, which follow the federal rules, provide specifically that "[C]ross examination shall be permitted on all relevant matters and matters affecting credibility." Ohio Rules of Evidence §611(B).

Moreover, it is also generally accepted in Ohio that a criminal defendant's cross-examination receive the widest latitude known to law. *State v. Browning*, 98 O.App. 8 (1954). The evidentiary rule uses the mandatory word "shall"; so, courts have held that improperly limiting the scope of cross-examination is prejudicial error. *State v. Muscatello*, 57 O.App. 2d 231 (1977).

Dr. Huntsman was called as a rebuttal witness following Mrs. Horning's defense, presumably to establish her sanity at the time of the alleged act. During cross-examination, Dr. Huntsman admitted she (1) had not consulted Mrs. Horning's psychiatrist of the prior eight years; (2) had not reviewed copies of the Fairview General Hospital medical records related to Mrs. Horning's extended psychiatric admission at the time of the offense and statement; (3) could not remember seeing Mrs. Horning's written statement; and (4) had never listened to Mrs. Horning's taped statement or read the transcript of that statement, both of which had been provided her months in advance of the trial.

Limitation on Cross-Examination

The tape recording had already been played to the jury as part of the State's case. So, during cross-examination of Dr. Huntsman, defense counsel asked Dr. Huntsman about certain things Mrs. Horning said in her statement. In particular, defense counsel asked Dr. Huntsman about Mrs. Horning's statement that she was an "abused child" who was "supposed to be born dead."

The purpose of these questions was to determine if, based on these statements, Dr. Huntsman could form an opinion of Mrs. Horning's mental condition at the time of the interrogation and of the reliability of what Mrs. Horning said. The trial court, however, refused to permit this line of cross-examination. It sustained the prosecutor's objection to this entire line of questioning on the ground that Dr. Huntsman had never read the transcript or listened to the tape. Why indulge such willful ignorance?

The following trial excerpt illustrates defense counsel's questioning of Dr. Huntsman about Mrs. Horning's statement:

Q.:	In the statement, Mary tells Lieutenant Gunsch, in response to one of the questions — in fact, I'll be just a little more specific.
Prosecutor:	Judge, I'm going to object to any reference to the statement. She indicated she hadn't heard it.
The Court:	That's correct Mr. Zore.
Zore:	I'm sorry, what?
The Court:	The witness has said that she has not reviewed it.
Mr. Zore:	Yes.
The Court:	So — what is the question?
Mr. Zore:	Okay. In the course of interviewing Mary, Lieutenant Gunsch had asked her if she was an abused child.
Prosecutor:	Judge, I'm going to object to any reference to the transcript.
The Court:	Let's meet at sidebar, please. (Thereupon, a discussion was had at the sidebar off the record.)
The Court:	Objection sustained. Next question. [T 326, 4-24].

Attempting another tack, defense counsel asked Dr. Huntsman whether Mrs. Horning had mentioned that her mother was not her real mother. Dr. Huntsman replied that "certainly it would be relevant to arriving at a diagnosis." [T 327, 1-9]. When Dr. Huntsman was asked whether such a mistaken belief would be a delusion or hallucination, the court sustained the prosecutor's objection; and defense counsel was instructed to proceed to a new line of questioning. [T 327, 9-15].

On further crossexamination Dr. Huntsman admitted that critical information was not available to her such as the medical

report of Dr. Savinsky, and the medical records of Fairview General Hospital. The other cornerstones of the prosecution's case—the tape-recorded statement, the transcript of the tape, and Mrs. Horning's written statement—*Dr. Huntsman simply chose not to review*. Thus, defense counsel's cross-examination of the State's expert witness was unconstitutionally limited on vital evidentiary points: Mrs. Horning's mental condition at the time and its effect on her statement's reliability.

Law and Argument

Mrs. Horning's statement was the foundation of the State's case (and her conviction). Questions about the reliability of the statement or Mrs. Horning's mental condition at the time of the statement are *well within the scope of permissible cross-examination*. Ohio has long held that the scope of criminal cross-examination is not limited to areas developed on direct examination, and is broadened to cover all issues pertinent to a case. Ohio Rules of Evidence §611(B); . Specifically, the test of proper subject matter has been said to be whether it would have been proper on *direct examination*. *Haney v. Dayton Street Transit Co.*, 45 O.L.Abs. 312, 67 N.E.2d 794 (App. - 1944).

Failing to suppress Mrs. Horning's statement was the trial court's initial error, but having admitted the statement into evidence, precluding cross examination regarding the statement made matters immeasurably worse. So the predicament created by allowing introduction of the statement is compounded by prohibiting defense cross-examination relative to it. Refusing to suppress the statement does not require the trial court to vouch for the statement's reliability; nor does it preclude effective cross-examination about the statement's reliability; nor should it preclude such an inquiry. This is not simply a matter of consistency; cross-examination is a fundamental constitutional right. The trial court's ruling permits prosecution witnesses to dictate the extent of their own cross-examination *by unilaterally deciding not to read unfavorable documents*.

The situation created by Dr. Huntsman's failure to review elemental evidence was completely unwarranted because the written and taped statements were provided Dr. Huntsman by defense counsel personally, *months in advance of the trial!*

Dr. Huntsman testified: "I don't recall if I saw the transcript. You did give me the tape prior to the hearing about the statement. And I — if you'll recall, the hearing kept getting continued and I kept putting off listening. . . . And I never listened to it." [T 325-326, 22-2].

The trial court's mistaken and highly prejudicial evidentiary rulings violated Mrs. Horning's Sixth Amendment right to confront the witnesses against her. For that reason and others set forth above, Mrs. Horning seeks reversal of her conviction.

CONCLUSION

The constitutional rights of the mentally ill, during a criminal investigation and throughout a trial, should be matters of special concern for the judiciary. The impact is dramatic in this appeal because Mrs. Horning was sentenced to ten years of actual incarceration arising from property damages of $287.00.

Therefore, the caution with which Mrs. Horning's case must be approached is well-expressed by Chief Justice Warren in *Blackburn v. Alabama, supra*:

> In the case at bar, the evidence indisputably establishes the strongest probability that Blackburn was insane and incompetent at the time he allegedly confessed. *Surely in the present state of our civilization a most basic sense of justice is affronted by the spectacle of incarcerating a human being upon the basis of a statement he made while insane*; and this judgment can without difficulty be articulated in terms of *the unreliability of the confession*, the lack of rational choice of the accused, or simply a strong conviction that our system of law enforcement should not operate so as to take advantage of a person in this fashion. [At U.S. 207. Emphasis supplied.]

Because of the Ohio courts' failure to recognize Mrs. Horning's child-like susceptibility to police suggestion, she submits, that as a mentally handicapped person, her constitutional rights were violated and she respectfully requests this Court to grant her petition and take jurisdiction of her case.

Respectfully submitted,

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APPENDIX

Trial Court's Denial of Defendant's Motion to Suppress

Trial Court's Limitation of Cross Examination

Trial Court's Judgment on the Verdict

Trial Court's Sentence

Ohio Eighth District Appellate Court's Decision and Order

Ohio Eighth District Appellate Court's Decision on Defendant's Motion for Reconsideration

Ohio Supreme Court's Denial of Motion for Leave to Appeal

Trial Court's Denial of Defendant's Motion to Suppress

IN THE COURT OF COMMON PLEAS
CRIMINAL DIVISION
CUYAHOGA COUNTY, OHIO

STATE OF OHIO	)	**CASE NO. 253638**
	)	
Plaintiff	)	**JUDGE JANET BURNSIDE**
	)	
vs.	)	
	)	
MARY HORNING	)	**JOURNAL ENTRY**
	)	
Defendant	)	

Defendant in Court with Counsel, Defendant's Motion to Suppress evidence is denied. Trial set for March 26, 1991 at 9:00 a.m.

/S/ JUDGE JANET BURNSIDE

Trial Court's Limitation of Cross-Examination

IN THE COURT OF COMMON PLEAS
CRIMINAL DIVISION
CUYAHOGA COUNTY, OHIO

STATE OF OHIO	)	**CASE NO. 253638**
	)	
Plaintiff	)	**JUDGE JANET BURNSIDE**
	)	
vs.	)	
	)	**TRANSCRIPT EXCERPT**
MARY HORNING	)	**CROSS-EXAMINATION OF**
	)	**STATE PSYCHOLOGIST**
Defendant	)	

Cross-Examination of State Psychologist
by Defense Counsel
Trial Transcript Pp. 325-326, Ll. 19-24

Q. Doctor, have you ever had the opportunity to read the transcript or listen to the taped statement in this case?

A. You—I don't recall if I saw the transcript. You did give me the tape prior to the hearing about the statement. And I—if you'll recall, the hearing kept getting continued and I kept putting off listening.

Q. Did you ever listen to it?

A. And I never listened to it.

Q. Okay, I'll scratch that page of questions, Doctor. In the statement, Mary tells Lieutenant Gunsch, in response to one of the questions — in fact, I'll be just a little more specific.

Prosecutor: Judge, I'm going to object to any reference to the statement. She indicated she hadn't heard it.

The Court: That's correct Mr. Zore.

Mr. Zore: I'm sorry, what?

The Court: The witness has said that she has not reviewed it.

Mr. Zore: Yes.

The Court: So — what is the question?

Mr. Zore: Okay. In the course of interviewing Mary, Lieutenant Gunsch had asked her if she was an abused child.

Prosecutor: Judge, I'm going to object to any reference to the transcript.

The Court: Let's meet at sidebar, please.

(Thereupon, a discussion was had at the sidebar off the record.)

The Court: Objection sustained. Next question.

Trial Court's Judgment on the Verdict

IN THE COURT OF COMMON PLEAS
CRIMINAL DIVISION
CUYAHOGA COUNTY, OHIO

STATE OF OHIO	)	**CASE NO. 253638**
	)	
Plaintiff	)	**JUDGE JANET BURNSIDE**
	)	
vs.	)	
	)	
MARY HORNING	)	**JOURNAL ENTRY**
	)	
Defendant	)	

This day again comes the prosecuting attorney on behalf of the State and Defendant, Mary M. Horning was brought into court represented by counsel. The jury is brought into court by the bailiff; trial continues; concludes.

The jury having heard all the testimony adduced, the arguments of counsel and the charge of the court, now retire to their room, in charge of the bailiff to deliberate; jury deliberating.

Now comes the jury, conducted into court by the bailiff and with all parties present, returned their verdict, in writing, to-wit: "We, the jury, having been duly impaneled and sworn, find defendant, Mary M. Horning, guilty of aggravated arson, RC 2909.02, with aggravated felony specifications, as charged in the indictment".

The court informed the defendant of the jury's verdict.

Sentencing set for April 2, 1991 at 9:00 a.m.

/S/ JUDGE JANET BURNSIDE

Trial Court's Sentence

IN THE COURT OF COMMON PLEAS
CRIMINAL DIVISION
CUYAHOGA COUNTY, OHIO

STATE OF OHIO	)	**CASE NO. 253638**
	)	
Plaintiff	)	**JUDGE JANET BURNSIDE**
	)	
vs.	)	
	)	
MARY HORNING	)	**JOURNAL ENTRY**
	)	
Defendant	)	

The defendant herein having, on a former day of court having been found guilty by a jury of aggravated arson, RC 2909.02, with aggravated felony specifications, as charged in the indictment, was this day in open court with his/her counsel present. (County Prosecutor Bondra present)

Thereupon, the court inquired of the said defendant if he/she had anything to say why judgment should not be pronounced against him/her; and having nothing but what he/she had already said and showing no good and sufficient cause why judgment should not be pronounced.

It is therefore, ordered and adjudged by the court that said defendant, Mary M. Horning, be imprisoned and confined in the Ohio Reformatory for Women, Marysville, Ohio for a minimum of ten (10) years actual incarceration to a maximum of twenty-five (25) years and pay the cost of this prosecution for which execution is awarded.

Defendant's motion for new trial denied; defendant advised of her right to appeal; motion for appeal bond denied.

This entry being corrected to show bond was denied not appealed.

/S/ JUDGE JANET BURNSIDE

Ohio Eighth District Appellate Court's Decision and Order

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 61679

STATE OF OHIO	)	
	)	
Plaintiff/Appellee	)	**JOURNAL ENTRY**
	)	**AND**
vs.	)	**OPINION**
	)	
MARY HORNING	)	
	)	
Defendant/Appellee	)	

Mary Horning appeals from her aggravated arson conviction with an aggravated felony specification. For the reasons set forth below, we affirm.

On May 15, 1990, a fire was reported at 19435 Riverview Avenue in Rocky River, Ohio. Fire investigators determined that the fire had been deliberately started. It burned a decorative wreath on the door of the upstairs tenant, Becky Starkey, and charred the door and the floor. No one was at home at the time.

Firemen on the scene recognized the downstairs tenant, Mary Horning, from a recent emergency call. Apparently, she had her stomach pumped due to an overdose of medications.

Police officer Bruce Gunsch called Mary Horning and invited her to come to the station for questioning regarding the fire. Gunsch tape-recorded the interview with Horning. He read Horning her constitutional rights. Horning then signed a pre-printed form indicating that she understood her rights. Gunsch testified at trial that

Horning's speech was coherent and that she did not exhibit unusual behavior during the interview.

Horning stated during the interview that she had started the fire because she did not want the house to be there when she got home. Horning was subsequently charged with aggravated arson with an aggravated felony specification. Counsel stipulated to the specification. Horning entered a plea of not guilty by reason of insanity. She was referred to a psychologist for evaluation of her competency to stand trial and her competency at the time of the act. The court-appointed psychologist testified that she believed Horning was suffering from a mental disease at the time of the act, but that the mental disease did not impair Horning's ability to know the wrongfulness of the act or her ability to refrain from acting. Counsel stipulated that Horning was competent to stand trial.

Horning filed a motion to suppress the statement, which was denied after hearing. Horning was tried to a jury and found guilty of aggravated arson. She was duly sentenced and brought this timely appeal, citing four errors.

I.

Appellant's first assignment of error states as follows:

THE LOWER COURT ERRED DENYING THE DEFENDANT'S MOTION TO SUPPRESS AND ADMITTING THE DEFENDANT'S WRITTEN AND ORAL STATEMENTS INTO EVIDENCE.

Appellant claims that she was mentally unsound at the time of the confession and was incapable of waiving her constitutional rights.

A defendant is free to waive the rights referred to in the *Miranda* warnings "provided the waiver is made voluntarily, knowingly and intelligently." *Miranda v. Arizona* (1966), 384 U.S. 436, 475. The prosecution has the burden to prove that the confession was voluntary under the totality of the circumstances. *State v. Edwards* (1976), 49 Ohio St. 2d 31.

In this case, appellant submitted evidence of her extensive psychiatric medical history. She also draws attention to the fact that her confession interview included denials and some delusional statements.

However, Lt. Gunsch testified that appellant was coherent and did not exhibit unusual behavior at the confession. The tape of the confession was played at the suppression hearing. The interview between Gunsch and appellant was not hostile or coercive, and appellant freely confessed to the crime. Appellant's written waivers of her rights were also admitted into evidence. The trial court reasonably concluded from this evidence that appellant's waiver was intelligently made, and properly denied the motion to suppress.

II.

Appellant's second assignment of error states as follows:

THE LOWER COURT ERRED BY PROHIBITING DEFENSE COUNSEL FROM READING THE CONFESSION TRANSCRIPT TO THE STATE'S EXPERT WITNESS AND ASKING FOR THE EXPERT'S OPINION ABOUT IT.

Appellant claims that she was prejudiced by the trial court's refusal to permit her attorney to question the psychologist, Dr. Huntsman, about records which Huntsman had never seen. Evid R. 602 provides that witnesses may only testify as to matters of which they have personal knowledge. Since Huntsman had never reviewed the records at issue, the court did not err in disallowing the questions. Appellant's second assignment of error is overruled.

III.

Appellant's third assignment of error states as follows:

THE VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

A reviewing court will not reverse a verdict where the trier of fact could reasonably conclude from substantial evidence with the state has proved the offense beyond a reasonable doubt. *State v. Eley* (1978), 56 Ohio St.2d 169. In *State v. Martin* (1983), 20 Ohio App.3d 172, the court set forth the test to be utilized when addressing the issue of manifest weight of the evidence. The *Martin* court stated as follows:

> ***The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *** See *Tibbs v. Florida* (1982), 457 U.S. 31, 38, 42.

Martin, supra at 175. Moreover, the weight of the evidence and credibility of witnesses are primarily for the trier of facts. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

In this case, appellant's confession clearly states that she started the fire and why. Accordingly, the jury's verdict was not against the manifest weight of the evidence.

IV.

Appellant's fourth assignment of error states as follows:

THE LOWER COURT ERRED IN OVERRULING THE DEFENDANT'S MOTION FOR A NEW TRIAL.

Appellant claims that she was entitled to a new trial on the basis of the three errors we have already rejected. Appellant's fourth assignment of error is overruled.

Affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KRUPANSKY, J. , CONCUR

DAVID T. MATIA, J., CONCUR

/S/ JOSEPH J. NAHRA
PRESIDING JUDGE

Ohio Eighth District Appellate Court's Decision on Defendant's Motion for Reconsideration

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

STATE OF OHIO	)	**COURT OF APPEAL**
	)	**NO. 61679**
Plaintiff/Appellee	)	
	)	
vs.	)	
	)	
MARY HORNING	)	**JOURNAL ENTRY**
	)	
Defendant/Appellee	)	

Motion by Appellant for reconsideration and request for conference or hearing denied.

KRUPANSKY, J. , CONCUR

DAVID T. MATIA, J., CONCUR

/S/ JOSEPH J. NAHRA
PRESIDING JUDGE

Ohio Supreme Court's Denial of Motion for Leave to Appeal

THE SUPREME COURT OF OHIO

1993 TERM

STATE OF OHIO	)	**September 22, 1993**
	)	
Appellee	)	**Case No. 93-907**
	)	
vs.	)	
	)	
MARY HORNING	)	**ENTRY**
	)	
Appellee	)	

Upon consideration of the motion for leave to appeal from the Court of Appeals for Cuyahoga County, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed *sua sponte* for the reason that no substantial constitutional question exists therein.

/S/ THOMAS MOYER
Chief Justice

Supreme Court, U.S.
FILED
JAN 18 1994
OFFICE OF THE CLERK

No. 93-1027

IN THE

Supreme Court of the United States

October Term, 1993

MARY HORNING,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE EIGHTH DISTRICT COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER QUESTION OF LAW

I. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED FOR FAILING TO ESTABLISH THAT A FEDERAL QUESTION WAS DECIDED BY THE STATE COURT OF APPEALS AND WHERE IT FAILS TO DEMONSTRATE THAT THERE EXISTS SPECIAL AND IMPORTANT REASONS FOR THE GRANTING THEREOF.

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No. 93-1027

IN THE

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PETITION FOR WRIT OF CERTIORARI TO THE EIGHTH DISTRICT COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO: The Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States

OBJECTIONS TO JURISDICTION

There is no substantial federal question which would require this Honorable Court to review this case.

The questions presented herein were raised in the Eighth District Court of Appeals for Cuyahoga County, Ohio and the Supreme Court of Ohio. The jury in the trial court found the petitioner guilty of all counts of the indictment. The Court of Appeals affirmed the judgment of conviction. The Supreme Court of Ohio dismissed *sua sponte* the petitioner's appeal for the reason that no substantial constitutional question existed.

The Ohio courts decided this case in accordance with the statutes and Constitution of the State of Ohio, the Constitution of the United States, and the applicable decisions of the Ohio and the United States Supreme Court. There is, therefore, no substantial federal question presented by the Petition for Certiorari.

STATEMENT OF THE CASE

Mary Horning, the petitioner herein, was indicted by the Grand Jury of Cuyahoga County, Ohio, on June 1, 1990, for Aggravated Arson in violation of R.C. 2909.02. The indictment contained a prior aggravated felony specification. In response to the charge, petitioner entered pleas of not guilty and not guilty by reason of insanity.

Because of the insanity plea, the trial court referred petitioner to the Court Psychiatric Clinic for evaluation of her competency to stand trial and her sanity at the time of the act. The court-appointed psychologist completed her evaluation on August 21, 1990, determining petitioner to be both competent to stand trial and sane at the time of the act.

After an exchange of discovery information, the defense filed a motion to suppress petitioner's oral and written confessions, arguing alleged mental illness as a basis. After a hearing, the trial court denied petitioner's motion on March 11, 1991. On March 24, 1991, a jury trial commenced. On March 29, 1991, the jury returned a guilty verdict to Aggravated Arson with a prior aggravated felony specification. On April 2, 1991, the trial court denied petitioner's motion for a new trial and sentenced her to a term of actual incarceration of a minimum of ten years to a maximum of 25 years.

The petitioner appealed her conviction to the Court of Appeals of Ohio, Eighth District. On January 28, 1993, the appeals court announced its journal entry and opinion wherein it affirmed the conviction. Petitioner's motion for leave to appeal to the Supreme Court of Ohio was overruled on September 22, 1993.

STATEMENT OF THE FACTS

On May 15, 1990, a fire was reported of a wooden residential dwelling at 19435 Riverview Avenue, in Rocky River, Ohio. The fire was started in the second floor hallway. The second floor of the double home was the rented residence of Becky Starkey and her two young children. Mrs. Starkey testified that she knew petitioner as her downstairs neighbor with whom she was having trouble. Petitioner has threatened to kill Mrs. Starkey's children and had accused Mrs. Starkey of soliciting her husband. Becky Starkey recalls leaving for work at approximately 11:00 A.M. the morning of May 15, 1990. When she left, petitioner was the only one at the home. Mrs. Starkey returned home at approximately 12:00 to 12:30 P.M. at the request of the Rocky River Fire Department.

Charles Clark, the owner of the property, testified that on the date of the fire, Jim Horning and his wife, petitioner, lived in the downstairs at 19437 Riverview Drive in Rocky River, Ohio. Mr. Clark confirmed that Becky Starkey and her family resided in the upper floors of the same dwelling on the day of the fire.

Mr. Clark testified that he was called to the residence on May 15, 1990, by the Rocky River Fire/Police Department. Upon arriving, Mr. Clark proceeded upstairs to a common hallway that both tenants mutually used. Mr. Clark found an area burned and damaged. The damages were eventually paid for by petitioner's husband.

Captain Carl Kalkbrenner of the Rocky River Fire Department testified that he investigated the fire scene and determined that the fire had been deliberately started and caused physical damage to the door of Becky

Starkey's residence. Captain Kalkbrenner indicated that the origin of the fire was a decorative wreath attached to Becky Starkey's door. The wreath burned and fell to the floor. According to Captain Kalkbrenner, the fire was incendiary in nature and was started at approximately 12:15 P.M. on May 15, 1990. Other firemen on the scene recognized the downstairs tenant, petitioner Mary Horning, from a recent emergency call. Apparently, she had her stomach pumped due to an overdose of medications.

Lieutenant Bruce Gunsch of the Rocky River Police Department testified that as part of his investigation of the incident, he called petitioner and invited her to come to the station for questioning regarding the fire. Prior to the interview, petitioner was informed that if she chose to come to the station, she could bring with her whomever she liked—her lawyer, her husband, whomever. Petitioner appeared for the interview alone. Prior to the interview, petitioner was read her constitutional rights by Lieutenant Gunsch. The rights were read to petitioner from a pre-printed form. In addition, petitioner signed a pre-printed form indicating that she understood her rights. Prior to signing the form, petitioner confirmed that she understood what she was doing and that no promises or threats had been made to her or any kind of pressure used against her.

The interview was recorded with petitioner's approval. Lieutenant Gunsch indicated that before, during, and after the interview, petitioner did not appear to be under the influence of alcohol or drugs, her speech was coherent, and she did not exhibit any unusual behavior. During the interview, petitioner repeatedly admitted setting the fire to the residence on May 15, 1990, because she did not want the house to be there

when she got home. Additionally, petitioner read and signed a three-page written confession. The confession indicated she set the fire because she hated the house, among other things. Above her signature on the written confession appears the phrase, "I have made this statement voluntarily."

On behalf of petitioner, her husband, James Horning, testified to his wife's past mental illness. Mr. Horning, on cross-examination, admitted petitioner had substantial medical expenses balanced against his limited income, leading to serious financial problems. He also indicated that he and petitioner had $30,000 in renter's insurance in effect on May 15, 1990. He also admitted that he and his wife would have collected the insurance proceeds had the house burned down. Mr. Horning additionally testified that around the time of this incident, petitioner was competent enough to feed, dress and bathe herself. Around the time of the fire, petitioner also drove herself to appointments, received mail, was employed, watched television, and traveled, according to her husband. Petitioner even entertained, went to couples' clubs, did the shopping, knew right from wrong, and had an appreciation for law and order.

Dr. Dennis Savinsky was called by the defense to say petitioner did not know the wrongfulness of her act at the time the act was committed. On cross-examination, Dr. Savinsky admitted he rendered this conclusion without reviewing any witness statements, photographs, police reports, or even the petitioner's written narrative confession. Dr. Savinsky admitted his opinion was based primarily on discussions he had with petitioner and her behavior during those discussions. Dr. Savinsky also indicated that petitioner did several things before, during, and after the fire that would indicate she

knew the wrongfulness of her act. Dr. Savinsky characterized an insane person to be out of touch with reality, yet admitted that petitioner was not that sort of person.

Dr. Savinsky's testimony was rebutted by the testimony of Dr. Nancy Huntsman of the Court Psychiatric Clinic. Dr. Huntsman, licensed since 1977, had examined over 200 individuals in order to determine their competency to stand trial or their sanity at the time of a crime. Dr. Huntsman examined petitioner for both of these issues on August 20, 1990, in the Court Psychiatric Clinic. Prior to the examination, Dr. Huntsman reviewed a multitude of medical documents along with certain items in the prosecutor's file, which includes witness statements and police reports pertaining to petitioner. Based upon her investigation and examination, Dr. Huntsman testified that she believed petitioner was suffering from a mental illness at the time of the act, but that the mental disease did not impair petitioner's ability to know the wrongfulness of the act or her ability to refrain from acting. Petitioner's counsel during Dr. Huntsman's testimony even stipulated that petitioner was competent to stand trial.

REASONS FOR DENYING THE WRIT

I. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED FOR FAILING TO ESTABLISH THAT A FEDERAL QUESTION WAS DECIDED BY THE STATE COURT OF APPEALS AND WHERE IT FAILS TO DEMONSTRATE THAT THERE EXISTS SPECIAL AND IMPORTANT REASONS FOR THE GRANTING THEREOF.

The petitioner has presented a total of two questions for review in her Petition for Writ of Certiorari.

In the first question for review, the petitioner alleges that she was mentally unsound at the time of the confession and was incapable of waiving her constitutional rights. The *sine qua non* of this argument is that constitutional error took place below. Not having demonstrated any error, however, one does not get to this issue. The petitioner does not challenge the standard's constitutionality, only the propriety of the application thereof by the trial and appellate court, hardly surprising as her conviction was affirmed.

In any event, assuming a federal question exists, a defendant is free to waive the rights referred to in the *Miranda* warnings "provided the waiver is made voluntarily, knowingly, and intelligently." *Miranda v. Arizona*, 384 U.S. 436, 475 (1966). The prosecution has the burden to prove that the confession was voluntary under the totality of the circumstances. *State v. Edwards*, 49 Ohio St. 2d 31 (1976). For a confession to be voluntary, it must be "*** the produce of free and rational choice." *United States v. Murphy*, 763 F.2d 202, 205 (6th Cir. 1985).

The factual inquiry as to voluntariness must necessarily focus on the conduct of the law enforcement officers and its effect on a reasonable person in the defendant's position. *See, Berkemer v. McCarty,* 468 U.S. 420, 82 L. Ed. 317, 336 and n.35 (1983).

In this case, petitioner submits evidence of her extensive psychiatric medical history. She also draws attention to the fact that her confession interview included denials and some delusional statements.

However, Lieutenant Gunsch testified that petitioner was coherent and did not exhibit unusual behavior before, during, or after the confession. The tape of the confession was played at the suppression hearing and at trial. The interview between Lieutenant Gunsch and petitioner was not hostile or coercive, and petitioner freely confessed to the crime. Certainly, petitioner would have a strong argument for involuntary confessions if it were true that Lieutenant Gunsch threatened or coerced her if she refused to answer his question. For example, in *Garrity v. New Jersey,* 385 U.S. 493, 494 (1967), police officers were told that they would be fired if they refused to cooperate in an investigation of departmental misconduct. The Supreme Court suppressed the officers' answers even though they failed to invoke the Fifth Amendment privilege. But unlike the defendants in *Garrity,* petitioner was never threatened if she refused to cooperate. She was never placed in a tiny room, administered truth serum or otherwise. In this case, the record makes it abundantly clear that, to the contrary, Lieutenant Gunsch went above and beyond the call of duty in determining whether petitioner's statements were "the product of free and rational choice." *Murphy, supra.* Twice, the petitioner acknowledged by signature that her statements were voluntary. Petitioner's written waivers of her rights were also admitted into evidence.

Petitioner wishes to equate mental illness to involuntary statements. However, although mental infirmity is surely relevant, the mere fact that petitioner claims to be mentally impaired does not prevent the obtaining of a valid confession if petitioner was not so influenced by mental illness at the time the confessions were made that she was able to knowingly, intelligently, and voluntarily waive her Fifth Amendment rights. *Blackburn v. Alabama*, 361 U.S. 199 (1960); *State v. Smith*, 61 Ohio St. 2d 284 (1991); *Johnson v. State*, 373 A.2d 300 (1977). As has been already discussed, there was nothing inherently coercive about the circumstances of petitioner's interview; and there is no support for her claim that her free will was overborne.

In summary, the State of Ohio submits the record demonstrates a thorough inquiry was conducted into the statements sought to be suppressed and the lower court's determination of its voluntariness should not be disturbed. Further, the petitioner's first assignment of error in support of her Petition for Writ of Certiorari raises no federal question. There is no special and important reason for granting the writ based on the argument of petitioner.

In her second argument, as in the first, the petitioner fails to present the court with a question of federal law. In summary, petitioner argues that she was prejudiced by the trial court's refusal to permit her attorney to question the State's psychiatric rebuttal witness about records of which the witness had no personal knowledge, nor had ever seen or heard.

Generally, "the trial court has broad discretion in the admission and exclusion of evidence and unless it has clearly abused its discretion and the defendant has been materially prejudiced thereby, [an appellate court] should be slow to interfere." *State v. Hymore*, 9 Ohio St. 2d 122, 128 (1967). Further, "[t]he term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Steiner v. Custer* (1940), 137 Ohio St. 448; *Conner v. Conner* (1959), 170 Ohio St. 85; *Chester Township v. Geauga Co. Budget Comm.* (1976), 48 Ohio St. 2d 372." *State v. Adams*, 62 Ohio St. 2d 151, 157-158 (1980).

Evid. R. 602 provides that witnesses may only testify as to matters of which they have personal knowledge. Thus, the lower court's decision is clearly in compliance with the Rules of Evidence and cannot be called unreasonable, arbitrary, or unconscionable. Since Dr. Huntsman had never reviewed, seen, or heard the records at issue, the court did not err in disallowing counsel's questions. Additionally, there is no showing that any of the proposed testimony, which was not properly proffered, would have affected the outcome of the trial. *United States v. Wright*, 625 F.2d 1017 (1980). Absent constitutional error and petitioner's failure to preserve this issue below, this argument must fail.

CONCLUSION

The Petition for Writ of Certiorari should be denied. There has been no important question of federal law decided by the State appellate court and no important and special reason exists for the granting of a Writ of Certiorari.

Respectfully submitted,

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Supreme Court, U.S.
FILED
FEB 17 1994
OFFICE OF THE CLERK

(3)

Case No. 93-1027

IN THE

Supreme Court of the United States

October Term, 1993

MARY HORNING, PETITIONER

vs.

STATE OF OHIO, RESPONDENT

Petition for Writ of Certiorari to the
Eighth District Court of Appeals for Cuyahoga County, Ohio

Reply Brief

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STATEMENT OF FACTS[1]

Introduction

Because the Court does not have a transcript of this case and because Respondent's Brief contains no citations to the transcript, there are representations of fact and law in the Brief which mandate this reply, lest a misimpression be created.

The Chronology

A great part of the confusion and irrationality of Mrs. Horning's statement can be seen by comparing the times in her statement to the times advanced by the Respondent in its Statement of Facts.

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[1] Three transcripts compose the trial court record:

- Mrs. Horning's oral statement (which was transcribed at the trial court's request and used as a record in lieu of the audio recording tape);
- the transcript of the motion for suppression hearing; and
- the transcript of the trial.

Citations to these transcripts use the conventions illustrated in the following examples:

C 10,15. Oral statement (Confession) made by Mrs. Horning at the Rocky River police station on May 29, 1991; unedited, text version of motion to suppress tape, State's Motion Exhibit 2. Example refers to page 10, line 15.

S 120, 9-15. Transcript Volume I, Proceedings of Motion to Suppress hearing on February 5, 1991. Example cites page 120, lines 9 through 15.

T 12-13, 20-8. Transcript Volumes II-IV, Trial proceedings. Example is for page 12, line 20 through page 13, line 8.

According to the Respondent's brief, May 15, 1990 went like this:

11:00 A.M.	"Becky Starkey recalls leaving for work at approximately 11:00 A.M. the morning of May 15, 1990."[2]
12:15 P.M.	"According to Captain Kalkbrenner, the fire was incendiary in nature and was started at approximately 12:15 P.M. on May 15, 1990."[3]
12:00 to 12:30 P.M.	"Mrs. Starkey returned home at approximately 12:00 to 12:30 P.M. at the request of the Rocky River Fire Department."[4]

When the Respondent's version of events is compared to Mrs. Horning's statement, one glaring inconsistency is disclosed. The confession of Mrs. Horning's "other personality"[5] stated clearly and unambiguously that it started the fire before Mrs. Horning left on a trip:

> Q. You set the fire upstairs?
> A. Yes.
> Q. You came home after you went to the Goodwill and library?
> A. Before I left.
> Q. Before you left?
> ....

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[2] Respondent State of Ohio's Brief in Opposition to Petition for Writ of Certiorari, page 4, paragraph 1.

[3] Respondent State of Ohio's Brief in Opposition to Petition for Writ of Certiorari, page 5, paragraph 1.

[4] Respondent State of Ohio's Brief in Opposition to Petition for Writ of Certiorari, page 4, paragraph 1.

[5] The context in which Lt. Gunsch whispered his question to Mrs. Horning was as follows: "Do you think, ... one of your personalities would be, have a tendency to arson? Do you think that one of your personalities could have? [C. 17, 16-22].

Q. So when you came back you had ....
A. I was surprised.
Q. You were surprised it was still standing. [C 19-20, 1-21.]

Because Mrs. Horning testified that she left for the Goodwill store and library around 10:00 a.m., the two scenarios are mutually exclusive. Assuming arguendo that the Respondent's Statement of Facts is correct in this regard, the *Petitioner could not have committed the crime* for which she was sentenced to ten years of actual incarceration. Therefore, if we presume Mrs. Horning's statement is in error, then this is but another fundamental way in which her statement was confused and delusional and should have been suppressed.

"No Unusual Behavior"

Respondent's Brief in Opposition states:

> The interview was recorded with petitioner's approval. Lieutenant Gunsch indicated that before, during and after the interview, petitioner did not appear to be under the influence of alcohol or drugs, her speech was coherent, and *she did not exhibit any unusual behavior*.[6] [Italics added]

The audio tape of the interrogation, and the transcript thereof, tell a different tale:

- Her moods during the interrogation ranged from sobbing tearfully to laughing with Lt. Gunsch.
- She was delusional, as was explained in detail in Mrs. Horning's Petition for Writ of Certiorari.
- At one point in the interview when she was asked to write her statement, she became so flustered that she was unable

[6] Respondent State of Ohio's Brief in Opposition to Petition for Writ of Certiorari, page 5, paragraph 3.

to write, and a stenographer was called into the interrogation room.

- ☐ She did not "repeatedly" admit to setting the fire; she first denied, then admitted, then said she couldn't remember—all in the space of fifteen minutes.

- ☐ During the interrogation, Lt. Gunsch staged a false diversion in order to apply additional psychological pressure to an already frightened and mentally unbalanced individual.[7]

Immediately after the interrogation, Mrs. Horning was taken by the police to the psychiatric ward of a local hospital. Under these circumstances, and in light of the fact Lt. Gunsch knew in advance that Mrs. Horning was mentally ill, it naturally follows that Mrs. Horning's constitutional rights were violated.

Further illustrating the coercive aspects of police conduct, the written statement, which was prepared by the police and proffered as a word-for-word transcript of the recorded statement, was flagrantly *edited* so as to change the context and meaning of Mrs. Horning's interrogation. Consequently, in addition to the coercion, there was fraud—which goes a long way toward proving coercion.

All the time, to the very end, the prosecution has maintained the written statement was verbatim. Nothing could be further from the truth.

The written statement left out the fact that Mrs. Horning ultimately said she didn't know if one of her personalities set the fire. The written statement also conveniently omits the delusional statements that Mrs. Horning was making in the midst of the

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[7] Q. And is it fair to say that, then, this is a choreographed sort of thing? You go—you have no real reason to leave the room. You do that for effect? A. Yes. Cross-examination of Lt. Gunsch, [T 79, 16-20]. Indeed, Lt. Gunsch's own notes referred to this portion of the interrogation as the "bait and change". [S 63-65, 25-25]; [S 66, 20-25].

statement. Even the trial judge at the suppression hearing remarked that the written statement composed by the police and signed by Mrs. Horning was nowhere near a word-for-word transcription.[8]

Drs. Huntsman and Savinsky

The Respondent raises another point in its brief in opposition that was not addressed in the original Petition for Writ of Certiorari, concerning Drs. Huntsman and Savinsky and their familiarity with Mrs. Horning.

At the outset it should be mentioned that Dr. Huntsman did not testify at the motion to suppress. Only Dr. Savinsky testified. This alone, coupled with the circumstances of the interrogation and Mrs. Horning's mental condition, warrants a reversal of the trial court's denial of Mrs. Horning's motion to suppress—simply because the state failed to sustain its burden of proof.

It also should be noted that Dr. Huntsman is a psychologist with no specialized licensing, who is not board-certified, and who worked for the Court.[9] Dr. Savinsky is a licensed psychiatrist, having earned his degrees from Georgetown University Medical School. Dr. Savinsky completed his psychiatric residency at Georgetown University Hospital (two years) and St. Elizabeth's Hospital (one and one-half years) in Washington, D.C. For eight years Dr. Savinsky has been in private practice.[10]

As for their respective contact with Mrs. Horning, Dr. Huntsman met her once for approximately one and one-half hours for the purpose of preparing a competency report for the Court. Dr. Savinsky, on the other hand, was Mrs. Horning's treating psychiatrist for a period of six years and through nearly 40 hospitalizations.[11]

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[8] S. 76-77, 23-3.
[9] T. 300-301, 10-9.
[10] T. 171-173, 5-8.
[11] T. 173-174, 9-10.

The Respondent states in its brief in opposition that Dr. Savinsky did not review any witness statements, photographs, police reports or the typewritten police summary of Mrs. Horning's statement—as if these documents had some bearing on his professional opinion as to her mental condition at the time of the offense and subsequent interrogation. In fact, they do not. The respondent's criticism of Dr. Savinsky is ludicrous in light of Dr. Huntsman's admission that she had not consulted with Dr. Savinsky, the treating psychiatrist of six years; she had not reviewed the medical records of Mrs. Horning's psychiatric hospitalization; she had not seen the written summary that Respondent now accuses Dr. Savinsky of ignoring; and she had never listened to the audio tape of the interrogation.

By contrast, Dr. Savinsky was the treating physician during Mrs. Horning's hospitalization after the statement, had listened to the entire tape of the interrogation, and was intimately familiar with Mrs. Horning's medical and psychiatric history.

ARGUMENT

The Fifth Amendment

If the Respondent is correct about the lack of a federal question, then this Court must have erred in accepting the *Blackburn*[12] and *Townsend*[13] cases and all those like them. Those cases posed the same type of federal question—to what extent does the United States Constitution protect mentally handicapped individuals from coercive interrogation? Should such coercion be condoned by accepting at face value the interrogating officer's self-serving observation that the defendant looked and acted normal?

The Petitioner does not suggest that mental illness equates to involuntariness. But she *does* maintain that the Respondent errs in the other direction when it implies that no special consideration is required in cases involving the interrogation of persons undeniably beset by mental illness. This was the holding of the *Miller*[14] case, which held that "there is little doubt that mental illness can interfere with a defendant's ability to make a knowing and intelligent waiver of his Miranda rights."

Limitation on Cross-examination

In its argument on the cross-examination issue, the Respondent is incorrect about the application of Rule 602 of the Ohio Rules of Evidence to Mrs. Horning's case. In its brief in opposition, the Respondent argues that "Evid. R. 602 provides that witnesses may only testify as to matters of which they have personal knowledge."[15] What is inaccurate and misleading about the Respondent's contention is that Rule 602's prohibition against

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[12] *Blackburn v. Alabama*, 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960).

[13] *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963).

[14] *Miller v. Dugger*, 838 F.2d 1530 (11th Cir. 1988).

[15] Respondent State of Ohio's Brief in Opposition to Petition for Writ of Certiorari, page 11.

testimony not founded on personal knowledge contains a specific exception for the testimony of expert witnesses.

> **Rule 602. Lack of Personal Knowledge**
> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

There is nothing new or unusual about this exception to Rule 602. The same exception is present in the Federal Rules of Evidence. Rule 703 provides "the facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by him or admitted in evidence at the hearing."

Therefore, since the Respondent was offering the statements into evidence, it was fair game for defense counsel to ask the state's expert psychiatric witness questions about those statements. These were the same statements which the State had introduced into evidence against Mrs. Horning—the same statements in which Mrs. Horning's mental state was in issue!

Far from being constrained, by some Ohio rule, to limit Petitioner's Sixth Amendment right of confrontation, the trial court was *required* to permit cross-examination on all relevant issues.

Rule 611(B) of the Ohio Rules of Evidence, titled "Scope of Cross-examination", provides:

> Cross-examination shall be permitted on all relevant matters and matters affecting credibility.

If Rule 611(B) is being used to deny defendants effective cross-examination, then the Rule violates the Sixth Amendment. But Petitioner contends the trial court *ignored* the commands of *both* the

Sixth Amendment *and* Rule 611(B), which implements the right of confrontation in Ohio.

CONCLUSION

In the "Conclusion" of Respondent's Brief in Opposition, the State of Ohio appears to concede there is a federal question to Mrs. Horning's case after all. But according to Respondent, that federal question just isn't important enough to warrant this Court's attention.[16] Such apathy and ignorance may well mirror local opinion. For the nation, as a whole, to embrace such views would be dangerous indeed.

The federal question raised by Mrs. Horning's case is, of course, critical for her and her husband. She faces a ten-year prison sentence without the possibility of probation or parole. But the situation is critical not only for the Hornings.

There is a widespread need for federal attention to this problem—the criminalizing of mental illness—imprisoning the mentally ill, for long stretches at a time, often for trivial offenses, as an alternative to treatment or community-based care. Statistics indicate this problem has reached staggering proportions.[17]

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[16] "The Petition for Writ of Certiorari should be denied. There has been no *important* question of federal law decided by the State appellate court and no *important* and special reason exists for the granting of a Writ of Certiorari." Respondent State of Ohio's Brief in Opposition to Petition for Writ of Certiorari, page 12, paragraph 1. [Italics added].

[17] Clinical studies suggest that 10 to 15 percent of prison populations have a major DSM-III-R thought disorder or mood disorder and need the services usually associated with severe or chronic mental illness. Jemelka, R., Trupin, E., and Childes, J.A. The mentally ill in prisons: A Review. Hospital and Community Psychiatry 40: 481-485, 1989. A nationwide survey of 1,391 local jails, which together hold 62 percent of our nation's jail inmates, has revealed the unimaginable: 7.2 percent of jail inmates—more than one of every 14 inmates—suffer from serious mental illness. E. Fuller Torrey, Joan Steiber, Jonathan Ezekiel, Sidney Wolfe, Joshua Sharfstein, John H. Noble and Laurie M. Flynn, *Criminalizing the Seriously Mentally Ill*, Public Citizens Health Research Group and the National Alliance for the Mentally Ill, 1992.

Large numbers of mentally ill persons are simply denied constitutional protections on criminal charges. These denials are routinely upheld on a theory of "waiver." An even larger number are incarcerated—without criminal convictions or even charges—as a means of cheap medical treatment! The issue is so much a "federal question" that it now forms part of the movement for national health care reform.

For all of these reasons, Mrs. Horning respectfully requests that the Court accept jurisdiction of her case.

Respectfully submitted,

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APPENDIX

Amendments to the United States Constitution

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Ohio Rules of Evidence

Rule 602. Lack of Personal Knowledge

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

Rule 611. Mode and Order of Interrogation and Presentation

(A) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(B) Scope of cross-examination. Cross-examination shall be permitted on all relevant matters and matters affecting credibility.

(C) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by him or admitted in evidence at the hearing.